

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE NATIONAL PRESCRIPTION  
OPIATE LITIGATION

MDL No. 2804

*This document relates to:*

Case No. 17-MD-2804

ALL CASES

Judge Dan Aaron Polster

**CERTAIN DEFENDANTS' MOTION FOR CLARIFICATION  
OF NOTICE DISCLOSING SCOPE OF EXPERT WORK**

Certain Defendants<sup>1</sup> respectfully request that the Court confirm that Professor Rubenstein's appointment at Dkt. No. 3218 to advise the Court on "complex and novel fee issues" and on the motion at Dkt. No. 3111 ("Common Benefit Motion") shall be subject to the reporting and review procedures of Federal Rule of Civil Procedure 53, as required by Article III of the U.S. Constitution.

Where, as here, the Court appoints an expert to assist with legal issues, it must comply with Federal Rule of Civil Procedure 53, including, but not limited to, the due process requirement for any analysis or recommendations to be placed on the public record for review, response, and, if necessary, objection by the parties. This requirement was incorporated in

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<sup>1</sup> This Motion is submitted by the following Defendants: Allergan plc f/k/a Actavis plc, Allergan Finance, LLC (f/k/a/ Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc.), Allergan Sales, LLC, Allergan USA, Inc.; AmerisourceBergen Drug Corporation, AmerisourceBergen Corporation; Anda, Inc.; Cardinal Health, Inc., Cardinal Health 110, LLC; Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc. f/k/a Watson Pharma, Inc., Warner Chilcott Company, LLC, Actavis South Atlantic LLC, Actavis Elizabeth LLC, Actavis Mid Atlantic LLC, Actavis Totowa LLC, Actavis Kadian LLC, Actavis Laboratories UT, Inc. f/k/a Watson Laboratories, Inc.-Salt Lake City, Actavis Laboratories FL, Inc., and f/k/a Watson Laboratories, Inc.-Florida; Discount Drug Mart, Inc.; CVS Pharmacy, Inc.; Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Par Pharmaceutical, Inc., Par Pharmaceutical Companies, Inc.; H. D. Smith, LLC, f/k/a. H. D. Smith Wholesale Drug Co.; Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Mallinckrodt LLC, SpecGx LLC, Mallinckrodt plc; McKesson Corporation; Noramco, Inc.; Prescription Supply Inc.; Rite Aid of Maryland Inc. d/b/a Rite Aid Mid-Atlantic Customer Support Center, Inc., Rite Aid of Ohio, Inc., Rite Aid Hdqtrs. Corp.; Walgreen Co., Walgreen Eastern Co; and Walmart Inc.

Section II.D of the Court’s prior Appointment Order at Dkt. No. 69, and Defendants believe that this requirement is contemplated already by the Appointment Order, but request confirmation from the Court that the requirement (and the other requirements set forth in the Appointment Order) are also fully applicable to Professor Rubenstein’s work.

### **ARGUMENT**

The Sixth Circuit and other courts have drawn a distinction between “technical” experts that may assist a court and “legal” experts. Although district courts may possess some “inherent authority” to appoint *technical* experts to assist with scientific or specialized knowledge without compliance with Rule 53, the Sixth Circuit has made clear that a court cannot use this authority to appoint an advisor on *legal* questions, no matter how extensive the appointee’s legal expertise. *Reed v. Bd. of Educ.*, 607 F.2d 737, 747–48 (6th Cir. 1979). “[C]ourts are presumed to be informed on legal issues, and the determination of purely legal questions is the responsibility of the court itself.” *Id.*; *see also Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988) (“A judge may not, for example, appoint a legal advisor to brief him on legal issues.”).

This rule ensures that judges do not unconstitutionally delegate their core function, and it protects the constitutional right of litigants to have controversies decided by an Article III judge. *See Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992) (“[T]he Constitution prohibits us from allowing the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not possess the attributes that Article III demands.”). Further, although a district court may appoint its own expert witness pursuant to Federal Rule of Evidence 706(a), expert witnesses may not provide legal conclusions and are subject to depositions and cross examination, among other requirements, regarding their appointment and presentation of

evidence. *See* Fed. R. Evid. 706; *United States v. Melcher*, 672 F. App'x 547, 553 (6th Cir. 2016) (“Rule 702 prohibits expert witnesses from testifying to legal conclusions.”).

Professor Rubenstein has been appointed to analyze “complex and novel fee issues,” and to “assist with questions posed both by the [Common Benefit] [M]otion and attorney’s fees generally, as they may arise.” Dkt. No. 3218 at 1. These issues do not require technical or scientific expertise, but rather legal expertise and analysis. Nor does the Common Benefit Motion present factual issues that require non-legal technical assistance or specialized knowledge for the Court to understand. Professor Rubenstein is a professor of law, and the issues identified in the Court’s order appointing Professor Rubenstein are legal. Therefore, under Article III and constitutional due process, the Court, not Professor Rubenstein, must ultimately decide the issues that Professor Rubenstein has been appointed to analyze. And prior to that decision, the parties are entitled to respond and be heard with respect to Professor Rubenstein’s analysis and recommendations. *See* Fed. R. Civ. P. 53(f)(1) (“In acting on a master’s order, report, or recommendations, the court must give the parties notice and an opportunity to be heard[.]”); *Reed*, 607 F.2d at 747–48.

The Court’s Order refers to Professor Rubenstein’s prior appointment as an expert consultant to Special Master McGovern, who was subject to the procedural, reporting, and other due process requirements of the Appointment Order at Dkt. No. 69, Rule 53, and ultimately Article III. Dkt. No. 3218 at 1 (citing Dkt. Nos. 877, 1618, and 1743). Defendants therefore understand Professor Rubenstein’s current appointment to be subject to the same requirements, including reporting requirements.

However, for the avoidance of doubt and to protect their constitutional and procedural rights, Defendants respectfully request that the Court confirm that the terms of Professor

Rubenstein's appointment include: (a) preparing a report and recommendation on the Common Benefit Motion; and (b) submitting that report and recommendation, including legal analysis and conclusions provided by Professor Rubenstein to the Court, on the public docket and subject to the parties' objections that will be considered under *de novo* review by the Court, as required by Section II.D of the Appointment Order and Rule 53(f).<sup>2</sup>

Dated: April 2, 2020

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Respectfully submitted,

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<sup>2</sup> The Court's order disclosing Professor Rubenstein's work also refers to assisting the Court with questions posed by "attorneys' fees generally, as they arise." Dkt. No. 3218. It is unclear what those issues might be, and they presumably could include issues or disputes that involve only a few defendants or that are entirely between and among plaintiffs and/or plaintiffs' counsel. Each defendant reserves the right to object to the use of Professor Rubenstein or to paying his fees for future work beyond resolution of the current Common Benefit Motion.

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<sup>3</sup> Mallinckrodt plc is an Irish company and is not subject to and contests personal jurisdiction for the reasons explained in its motion to dismiss for lack of personal jurisdiction; it is specially appearing for this motion, and thus does not waive and expressly preserves its personal jurisdiction challenges.

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**CERTIFICATE OF SERVICE**

I, Mark H. Lynch, hereby certify that the foregoing document was served via  
the Court's ECF system to all counsel of record.

/s/ Mark H. Lynch

Mark H. Lynch